In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE ADDYSTON PIPE AND STEEL Company, Dennis Long & Co., Howard-Harrison Iron Company, Anniston Pipe and Foundry Company, South Pittsburg Pipe Works, and Chattanooga Foundry and Pipe Works, appellants,
v.
THE UNITED STATES.

No. 269.

BRIEF FOR THE UNITED STATES.

STATEMENT.

By direction of the Attorney-General, this suit was brought in the circuit court of the United States for the eastern district of Tennessee, on December 10, 1896, against the following corporations, to restrain them from continuing to violate the act of July 2, 1890, by operating under an alleged illegal combination:

The Addyston Pipe and Steel Company, of Cincinnati, Ohio.

Dennis Long & Co., of Louisville, Ky.

Howard-Harrison Iron Company, of Bessemer, Ala.

Anniston Pipe and Foundry Company, of Anniston, Ala.

South Pittsburg Pipe Works, South Pittsburg, Tenn.

Chattanooga Foundry and Pipe Works, of Chattanooga, Tenn.

These six corporations are engaged in the manufacture of cast-iron pipe used by municipal and other corporations for gas, water, sewer, and other purposes. The bill charges them with carrying on a combination, in restraint of trade or commerce among the several States, for the purpose of suppressing competition among themselves, and for arbitrarily fixing and maintaining the prices of cast-iron pipe.

THE PROCEEDINGS.

By stipulation (Rec., p. 288) the application for an injunction was treated as a hearing upon the merits, and the case was submitted to the circuit court upon the bill, the answer, and the affidavits. Judge Clark dismissed the bill on the merits (Opinion, Rec., pp. 275, 287; 78 F. R., 712, 724). The circuit court of appeals (Mr. Justice Harlan and Judges Taft and Lurton) reversed the judgment of the circuit court and remanded the case "with instructions to enter a decree for the United States perpetually enjoining the defendants from maintaining the combination in cast-iron pipe described in the bill, and substantially admitted in the answer, and from doing any business thereunder." (Opinion, Judge Taft, Rec., pp. 293, 327; 85 F. R., 302.)

THE PLEADINGS.

THE PETITION (Rec., pp. 2-9).

The petition charges:

3. The defendants are the only persons engaged in manufacturing cast-iron pipe who have the capacity to supply the demand in thirty-six States and Territories named, being those west of New York and Pennsylvania and south of Virginia.

> There are a few other pipe works located in the above territory, but for want of capacity they are unable to compete with defendant * * * and have been practically driven out of the market.

4. The defendants, in order to monopolize the trade in cast-iron pipes in the above territory, and force the price to an unreasonable rate and destroy all competition, on December 28, 1894, entered into a contract or combination, in the form of a trust or conspiracy, in restraint of trade or commerce among the several States and Territories named, in regard to the manufacture and sale of cast-iron pipe. The name of the conspiracy is the "Associated Pipe Works." The defendants since said date have been operating their shops under said agreement, "and are now engaged in selling and shipping from their shops said cast-iron pipe into other States and Territories than the States and Territories in which defendant resides, and under contract entered into with citizens of such other States and Territories."

5. In order to prevent competition in the pay territory, a bonus was charged on every ton of pipe sold therein, the amount being determined "by how much the combi-

nation could force the customers to pay." A bonus ranging from three to nine dollars has been collected, which represents "the amount charged for pipe over and above a reasonable and fair price for same, and above the price that defendant would be willing to sell for if the trust or combination did not exist." The output of the six shops amounts to about 220,000 tons; multiplied by the average bonus of $6 per ton, this amounts to $1,320,000. The petition charges that the amount of pipe sold and shipped in 1896 will exceed 220,000 tons.

6. In the pay territory, except the reserved cities, each shop could sell its pipe at what price it saw proper, but it had to account to the trust for the bonus. The bonuses were distributed every two weeks. The division of profits thus brought about prevented competition.

7. In order to make the combination effective, all quotations made before it was consummated were withdrawn and new quotations advancing the price from three to nine dollars a ton prepared.

8. As a part of the combination, certain cities were reserved for individual defendants. The Anniston Pipe Works was to supply Atlanta, the Howard Harrison Company, Birmingham and St. Louis; the Chattanooga Works, Chattanooga and New Orleans; the South Pittsburg Works, Omaha; Dennis, Long & Co., Louisville and certain cities in Indiana; while the Addystone Company was to supply Cincinnati and other cities in Ohio and Kentucky. When an inquiry for bids was received from a reserved city, the shop to which the city was reserved would be requested to name the price which the other shops should "protect." This done, the other shops would bid over the price to be "protected," thus

insuring the job unto the shop which "owned" the city, and a fat bonus for division among its "competitors."

9. The principal contracts obtained by the defendants have been for gas, water, and sewer pipe, which are publicly let to the lowest bidders. By the scheme described the defendants, through fraud and collusion, have secured most of these contracts at exorbitant prices.

10. There are no pipe works in the pay territory outside the combination with capital or capacity sufficient effectively to prevent the operation of the monopoly created by the combination.

11. About May 27, 1895, the defendants abandoned the fixed bonus for the "auction-pool plan" in the pay territory. This was done because the fixed bonus had not resulted in the anticipated advancement in price of pipe. By the auction-pool plan a central committee composed of representatives from each shop fixed the price for the jobs. The price being fixed, the representatives, in their secret meeting, bid against one another for the job, the shop bidding the biggest bonus taking the contract. The private-auction pool having thus fixed the price and determined who should get the job, the other shops protected the price by bidding over it, thus deceiving the purchaser by the pretense of competition.

12. During the early part of 1896 St. Louis wanted about 5,000 tons of cast-iron pipe. St. Louis was allotted to the Howard Harrison Company, of Bessemer, Ala. The price of pipe at Bessemer was from $13 to $15 per ton. The freight from Bessemer to St. Louis was $3 per ton, so the fair price of the pipe delivered at St. Louis was from $16 to $18 a ton. The combination

fixed the price at $24 per ton, the Howard Harrison Company bidding that price and the other shops protecting its bid by higher ones. As a result, St. Louis was compelled to pay from $6 to $8 per ton more than the defendants were selling the same pipe for in free territory, or between $30,000 and $40,000, which, treated as a bonus, was divided among the defendants.

DEMURRER AND ANSWER (Rec., pp. 25-35).

The defendants demurred because it did not appear from the terms of the contract or combination, as alleged), that it undertook directly to restrain or monopolize trade or commerce among the several States (pp. 25, 26), and answered:

1. Cast-iron pipe is not a commodity in general use, but is made for special purposes, may be produced in unlimited quantities, and is generally sold under contract requiring it to conform to certain specifications.

3. The defendants are not the only persons manufacturing pipe in the pay territory. There are nine other shops in this territory, with a daily capacity of about 835 tons. There are besides ten or more other pipe works outside the pay territory, with a daily capacity of 1,550 tons. The defendants have not driven any competing companies out of the pay territory. They deny that they entered into the agreement of December 28, 1894, for any unlawful purpose; they admit that "each of the respondents did, about the time stated, become members of an association formed for the mutual benefit of its members, and on a plan of cooperation which in no manner referred to interstate commerce, or illegally

restrained the trade of themselves, or any others, as will be hereinafter fully explained."

5. It is true, as charged in paragraph 9 of said petition, *that all contracts secured by them were, in the main, contracts to furnish pipe to gas, water, and municipal corporations, let to the lowest bidders after advertising for bids;* that defendants and all other persons engaged in the same business were appealed to by said gas, water, and municipal corporations, or were invited or permitted to furnish bids at which they would do certain work. It was the option and probably the duty of said corporations to let their work by biddings, instead of making contracts or buying in the open market.

Previous to December 28, 1894, or about that date, defendants had bid on such occasions against each other and other companies proposing to take such contracts, *and the competition provoked by this mode of dealing* secured to said gas, water, and municipal corporations the advantage of ruinous competition to the bidders, while said bidders had no other market in which to dispose of their product. In this manner of buying pipe, and letting all their contracts, the customers prevented the establishment of market prices, and kept the manufacturers constantly arrayed against each other, with strong motives not only to underbid but to otherwise injure the business of each other.

To meet this situation, defendants joined an association for their mutual protection in lessening expenses, securing better freight rates, etc., and as such members had an understanding among themselves, the sole object of which was to secure a fair share of work for each, according to their relative capacity, and to enable each one to continue in

operation, but not for the purpose of monopolizing or restraining either State or interstate trade or commerce. In fact, they are advised, that from the manner in which said gas, water, and municipal corporations bought their pipe and let their contracts, their dealings were of local character, and could not be the subject of interstate commerce. No one of the defendants was restrained from securing work, and the only restraint that might be implied in said arrangement was the understanding that each of defendants was entitled to share in a certain limited portion of the price paid on said contracts, according to their relative capacity.

As a means of securing this, a bonus was provided on all contracts within the pay territory. The price of pipe was fixed by competition and was not affected by the bonus, which was more in the nature of a premium, its object being "to restrain any one or more of defendants from monopolizing more than a proper share of trade in any State or Territory." The bonus being deducted from a fair price, restrained each shop from doing more than its proper share of work.

7. "They are advised that there was no legal obligation rested on them to bid more on contracts than their rivals, or refrain from agreeing on a reasonable measure of restraint as among themselves, so that each of them could do its proper share of work."

8. On or about May 27, 1895, they changed the arrangement theretofore existing for fixing the premium. This change was made (p. 32) "*to guard against competition which was unfair and ruinous*, and to make it to the interest of each of the defendants, as members of an

association formed for mutual advantages, to accord to the others a fair share of the work left, and at such reasonable prices as would enable all to continue in business.

The arrangement was as follows: On receiving notice that a contract for pipe was to be let, their representatives met and "jointly agreed in advance" on a price for the pipe, which was reasonable. This done, the question as to which of them should secure the contract was determined by the "largest premium" offered. The price fixed "was only adopted as a fair price, and constituted a basis upon which the defendants *could intelligently compete* among themselves."

9. The St. Louis contract was let under certain specifications, bond being required to comply with them. Before the contract was advertised, the officials of St. Louis had fixed the sum of $25 per ton as the price which should be secured. The contract was let wholly within the State of Missouri, and was not an act of interstate trade or commerce.

THE UNLAWFUL COMBINATION.

MEETING DECEMBER 28, 1894. CHATTANOOGA.

Prior to December 28, 1894, The Anniston, The Bessemer, The Chattanooga, and The South Pittsburg companies had been associated in business as "The Southern Associated Pipe Works." On that day, at a meeting of The Southern Associated Pipe Works at their office in Chattanooga, the following proposition

was submitted for admitting to membership the Cincinnati and Louisville companies (Rec., pp. 64, 65):

> First. The bonuses on the first 90,000 tons of pipe secured in any territory 16″ and smaller sizes shall be divided equally among six shops.
>
> Second. The bonuses on the next 75,000 tons 30″ and smaller sizes to be divided among five shops, South Pittsburg not participating.
>
> Third. The bonuses on the next 40,000 tons 36″ and smaller sizes to be divided among four shops, Anniston and South Pittsburg not participating.
>
> Fourth. The bonuses on the next 15,000 tons consisting of all sizes of pipes shall be divided among three shops. Chattanooga, South Pittsburg, and Anniston not participating.
>
> The above division is based on the following tonnage of capacity:

	Tons.
South Pittsburg	15,000
Anniston	30,000
Chattanooga	40,000
Bessemer	45,000
Louisville	45,000
Cincinnati	45,000

> When the 220,000 tons have been made and shipped and the bonuses divided as hereafter provided, the auditor shall set aside into a "reserve fund" all bonuses arising from the excess of shipments over 220,000 tons and shall divide the same at the end of the year among the respective companies according to the percentage of the excess of tonnage they may have shipped (of the sizes made by them) either in pay or free territory. The above proposition is intended to include all ordinary pipe specials in the tonnage named. It is also the intention of this proposition that the bonuses on all pipe

larger than 36 inches in diameter shall be divided equally between the Addyston Pipe and Steel Company, Dennis Long & Co., and the Howard Harrison Iron Company.

In submitting this proposition the chairman of the meeting stated that (Rec., p. 65) "the object of the meeting was to determine whether the Louisville and Cincinnati shops would be willing to become members of the association. He went over the ground and dwelt on the advantages that would result from an association as it could be conducted by the six shops, and also presented the disadvantages of working separately—*the cutting of prices* and other disastrous consequences that had resulted in the past from disorganization, jealousy, and *rivalry in business.*"

The proposition was adopted, and it was then resolved (Rec., bottom pp. 65, 66, 67):

First. That this agreement shall last for two years from the date of the signing of same, until December 31, 1896.

Second. On any question coming before the association requiring a vote, it shall take five affirmative votes thereon to carry said question, each member of this association being entitled to but one vote.

Third. The Addyston Pipe and Steel Company shall handle the business of the gas and water companies of Cincinnati, Ohio, Covington and Newport, Ky., and pay the bonus hereafter mentioned, and the balance of the parties to this agreement shall bid on such work such reasonable prices as they shall dictate.

Fourth. Dennis Long & Company, of Louisville, Ky., shall handle Louisville, Ky., Jeffersonville,

Ind., and New Albany, Ind., furnishing all the pipe for gas and water works in above-named cities.

Fifth. The Anniston Pipe and Foundry Company shall handle Anniston, Ala., and Atlanta, Ga., furnishing all pipe for gas and water companies in above-named cities.

Sixth. The Chattanooga Foundry and Pipe Works shall handle Chattanooga, Tenn., and New Orleans, La., furnishing all gas and water pipe in the above-named cities.

Seventh. The Howard-Harrison Iron Company shall handle Bessemer and Birmingham, Ala., and St. Louis, Mo., furnishing all pipe for gas and water companies in the above-named cities; extra bonus to be put on East St. Louis and Madison, Ill., so as to protect the prices named for St. Louis, Mo.

Eighth. South Pittsburg Pipe Works shall handle Omaha, Nebr., on all sizes required by that city during the year of 1895, conferring with the other companies and cooperating with them; thereafter they shall handle the gas and water companies of Omaha, Nebr., on such sizes as they make.

NOTE.—It is understood that all the shops who are members of this association shall handle the business of the gas and water companies of the cities set apart for them, including all sizes of pipe made by them.

The following bonuses were adopted for the different States as named below: All railroad or culvert pipe or pipe for any drainage or sewerage purposes on 12-inch and larger sizes shipped into bonus territory shall pay a bonus of $1 per ton. On all sizes below 12-inch and shipped into "bonus territory" for the purposes above named there shall be a bonus of $2 per ton.

List of bonuses.

Alabama	$3.00	Ga. coast pts	$1.00
B'gham, Ala	2.00	Idaho	2.00
Anniston, Ala	2.00	Nev	3.00
Mobile, Ala	1.00	Oklahoma	3.00
Arizona Ter	3.00	Wis	2.00
California	1.00	Texas, interior	3.00
Colorado	2.00	Texas, coast	1.00
Ind. Ter	3.00	Wash'ton Ter	1.00
North C	1.00	Michigan	1.50
Tenn., east of C'-Land.	2.00	West Va	1.00
Tenn., middle and west	3.00	Kansas	2.00
Illinois, except Madison and East St. Louis, as previously provided	2.00	Ky	2.00
		La	3.00
		Miss	4.00
		Mo	2.00
Wyoming	4.00	Montana	3.00
Oregon	1.00	Nebraska	3.00
Ohio	1.50	N. Mex	3.00
N. D	2.00	S. C	1.00
S. D	2.00	Minn	2.00
Florida	1.00	Utah	4.00
Georgia	2.00	Indiana	2.00
Atlanta, Ga	2.00	Iowa	2.00

All other territory free.

On motion of Mr. Llewellyn, the bonuses on all city work as specially reserved shall be $2 per ton.

It was further agreed at this meeting (Rec., p. 67):

First. That every order shall be reported daily, whether from free territory or bonus territory.

Second. Reports of shipments shall be made on the 1st and 16th of each month, the auditor being authorized to draw on each company at sight for debit balances for time reported.

Third. That every member shall file with the auditor a report of all orders booked when the association goes into effect, and only the orders thus reported shall be exempt from bonus payments in pay territory. At this

time, all quotations made previous to the agreement are to be withdrawn unless the members are willing to pay the bonus established.

MEETING JANUARY 22, 1895, CHATTANOOGA.

At a meeting of the Associated Pipe Works, at Chattanooga, January 22, 1895, by-laws were adopted, which are printed in the record, pages 68 and 69. These by-laws provide:

For an executive committee, of one member from each company;

For a chairman, to preside at meetings, call special meetings, and have general supervision of the affairs of the association;

For an auditor and assistant auditor.

Each shop shall report daily to the auditor all orders secured in bonus or free territory; and on the 1st and 16th of each month, all shipments made in all territory, showing among other things "the amount of bonus and tonnage, of the bonus as well as free territory."

The auditor shall make carbon copies daily of all reports received and send one to each shop. He must keep such records and accounts as will enable him to give at all times the exact status of the affairs of the association. On the 1st and 16th of each month he shall send to each shop "a statement of all shipments reported in the previous half month, with a balance sheet showing the total amount of the premium on shipments, the division of the same, and a debit-credit balance of each company."

The system of fixed bonuses as a means of restricting competition and maintaining prices proved unsatisfactory. Accordingly, at the meeting held at Louisville May 16, 1895, the following resolution was offered (Rec., p. 70), which was adopted at the meeting held at the same place May 27, 1895 (Rec., p. 71):

THE AUCTION POOL.

Whereas the system now in operation in this association of having a "fixed bonus on the several States" has not in its operation resulted *in the advancement in the prices of pipe, as was anticipated, except in "reserved cities,"* and some further action is imperatively necessary in order to accomplish the ends for which this association was formed: Therefore be it

Resolved, That from and after the 1st day of June that all competition on the pipe lettings shall take place among the various pipe shops *prior to the said letting*. To accomplish this purpose it is proposed that the six *competitive* shops have a "representative board" located at some central city, to whom all inquiries for pipe shall be referred, *and said board shall fix the price at which said pipe shall be sold*, and bids taken from the respective shops for the privilege of handling the order and the party securing the order *shall have the protection* of all the other shops. Should it be deemed best for the interest of this association to eliminate the Southern territory from the control of "the general pool" and refer all lettings in said territory to the Southern shops for their exclusive action, upon the agreement of the four Southern shops to pay this association the fixed

bonus now in force in said Southern States, said Southern shops to have the option of doing so.

This was the "auction pool." In its practical operation the following exception was made at the meeting of May 27, 1895 (Rec., p. 71):

> When an inquiry is reported to which a member can properly establish a claim as a special customer, such inquiry should not be disposed of by the "auction basis," but shall be handled by such member, *the committee fixing the price and bonus*, such price and bonus to be commensurate with prices and bonuses at the time such inquiry shall be reported.

At this meeting it was also agreed (Rec., p. 71) that the question of continuing the association beyond December 31, 1896, should be taken up and decided by the association between the 1st and 15th day of July, 1896.

To carry out the "auction pool" rule it was agreed (Rec., p. 71) "that all parties to this association having quotations out shall notify their customers that the same will be withdrawn by June 1, 1895, if not previously accepted; and upon all business accepted on or after June 1 bonuses shall be fixed by the committee."

MEETINGS DECEMBER 19 AND 20, 1895, CHATTANOOGA.

At the meeting held at Chattanooga December 19, 1895, it was resolved (Rec., p. 72):

> That upon all inquiries for prices from "reserved cities" for pipe required during the year of 1896, *that prices and bonus shall be fixed* at a regular or called meeting of the principals.

At this meeting it was also proposed to move the headquarters from Cincinnati to Chicago (Rec., p. 72), and this was done on ———— (Rec., p. —).

At the meeting on December 20, 1895, the plan for the division of bonuses originally adopted (Rec., pp. 64, 65), was modified by making the basis the amounts shipped into "pay territory," instead of into any territory, free or pay.

MEETING FEBRUARY 14, 1896, CINCINNATI.

At the meeting of February 14, 1896, at Cincinnati, it was resolved that (Rec., p. 76):

> All jobs sold previous to January 1, 1896, by the committee that are not closed in thirty days from this date shall be canceled and resold, and in future no member buying a job shall be allowed longer than sixty days after the action of the committee in which to close the same, etc.

FIXING BONUSES AND BUYING JOBS.

MEETING MAY 16, 1895, AT LOUISVILLE (Rec., pp. 69, 70).

The bonus for Dayton, Ohio, was fixed at $3 for the first 200 tons, and $2 for the balance of the tonnage to make up the year's supply.

The bonus on Port Clinton, Ohio, was fixed at $2, instead of $1.50.

On motion, it was declared that whenever an order is reported by any shop, and a doubt exists as to the proper bonus to be paid, that it be reported, with the facts in the case, to be acted upon at the next meeting of the executive committee.

On motion, it was resolved that any party having reported a *bona fide* time contract upon which a bonus is to be paid shall be entitled to the protection of the other members of the association.

The Addyston reported a contract with the Big Four Railroad for all culvert pipe to be used during 1895, and the same was subject to bonus.

On motion, the additional 25 cents per ton specified by Anniston for Shelby, Mich., be charged at $1.50 bonus, and other additional orders be paid for at current bonus in force at the time such orders are reported.

MEETING DECEMBER 19, 20, 1895, CHATTANOOGA (Rec., pp. 72, 74).

The bonus for pipe supplied by the Addyston Company for Westwood was corrected to $2, and the bonus on the Riverside contract, let December 14, was fixed at $2 (p. 72).

Dennis Long & Co. were allowed to close contract for the year 1896 with the Louisville Water Company at the best price they can obtain for the same, and after securing contract refer the same to the meeting of the principals to fix bonus.

The bonus on the Illinois Central order was put back to $5 (Rec., p. 93).

W. L. Davis moved to sell the 519 pieces of 20-inch pipe for Omaha, Nebr., for $23.40 delivered. Carried (p. 74).

F. B. Nichols moved that Anniston participate in this bonus *and the job was sold over the table.* Carried.

Pursuant to the motion the 519 pieces of 20-inch pipe for Omaha were sold to Bessemer *at a premium of $8* (p. 74).

MEETING FEBRUARY 14, 1896, AT CINCINNATI (Rec., pp. 74-76).

Dennis Long & Co. *having paid J. B. Clow & Sons* 35 cents per ton in order to secure an order from A., T. & S. F. R. R. Co. of 1,500 tons, it was ordered that the same be deducted from the bonus fixed on that job.

The bonus on sales memorandum 118 secured by Bessemer under their shop No. 54 was declared to be sold $8.95 as originally fixed when the job was sold to Chattanooga, on inquiry from W. L. Cameron, Kansas City, Mo.

On motion, the bonus on Bessemer's order No. 52 for Birmingham Gas Company was fixed at $5, the order being 66 tons from "reserved city" and larger than a small routine order. It was referred to the principals for action.

On motion, the following bonuses were fixed (Rec., p. 75):

Chicago Gas Company, George Knapp, 7,000 to 10,000 tons, year's requirement; prices, $22 for 6 and 8 inch and $21.50 for larger sizes, and 2 cents for specials on cars Chicago, bonus fixed on same, $5.

Calumet Gas Company, Calumet, Ill., requirements for the year not exceeding 1,500 tons; prices, $23.50 for 4-inch and $22 for 6 and 8 inch, and $21.50 for larger sizes, and 2¼ cents for specials; bonus fixed, $5.

Northwestern Gas Light and Coke Company, Evanston, Ill., requirements for the year not exceeding 1,500 tons; prices, $23.80 for 4-inch and $23.30 for 6 and 8 inch, and $21.80 for 10 and 12 inch, and 2¼ cents for specials; bonus fixed at $5.

Louisville Water Company, Louisville, Ky., 700 pieces of 8-inch, 2,500 pieces of 6-inch, and 300 pieces of 4-inch; price, $22.50 in water company's yard;

drayage, 35 cents per ton; bonus fixed on same, $6.50.

La Clede Gas Company, St. Louis, Mo., 3,248 tons; prices, $25 for 4-inch, $24 for 6, 8, 10, and 12 inch, and $22.75 for 16, 18, and 20 inch, delivered on street; drayage, about $1 per ton; bonus fixed, $5.65.

St. Louis Water Company, city of St. Louis, Mo., 2,800 tons, 35 tons 3-inch, 100 tons 4-inch, 1,200 tons 6-inch 'A', 300 tons 6-inch 'B', 1,200 tons 12-inch 'A,' and 4 tons 8-inch 'A' (2,839 T.); prices $24, switching and drayage 40 cents; bonus fixed on above, $6.50.

C., R. L. & P. R. R., Keokuk, Chicago, St. Joe delivery, Keokuk and Chicago delivery, $22.35; St. Joe delivery, $24—contract for year's supply. Present specifications $20.24, 36 and 42 inch, about 702 tons; bonus fixed on the same, $7.50.

C., B. & Q., St. Louis delivery, $21, year's supply. Bonus fixed on the above, $6.50.

Indianapolis Water Company, bonus fixed on the same, $4.20. Above includes year's supply, about 1,000 tons, price $20.70.

MEETING MARCH 13, 1896, CHICAGO (Rec., p. 76).

Ordered, That if, in the judgment of Dennis Long & Co., they deemed it to be for the best interest of this association to reduce the price of pipe to the Chicago Gas Company 50 cents per ton, they be allowed to do so, and the "bonus" be reduced accordingly.

Moved that "bonus" on Anniston's Atlanta Waterworks contract be fixed at $7.10, provided freight is $1.60 a ton. Carried.

The following bonuses were fixed:

On Anniston's U. G. I. Co.'s orders for all destination as now reported, $5; on all companies voting

"aye," except South Pittsburg, on the Omaha order, they voting "no" on that order.

The following motion was offered by W. L. Davis: It having been demonstrated that sales memos. Nos. 107 and 118 are the same inquiry, the committee's action on 118 is hereby cancelled, and the "bonus" on 107 reduced to $6.55, to equalize the reduction of $1 per ton made by Bessemer to meet the price made by Shickle-Harrison & Howard Iron Company. Carried.

PRACTICAL OPERATION OF THE AGREEMENT.

The record contains an interesting exposé of the working of the agreement with respect to contracts let in different cities:

Atlanta.—This city was reserved to the Anniston Company, of Bessemer, Ala., which paid a bonus of $2 per ton (Rec., p. 66), until it was provided, on December 19, 1895, that such bonus should be fixed at a meeting of the principals (p. 72).

On February 15, 1896, Chattanooga wrote Anniston as follows (Rec., p. 82):

> We have the following inquiry from the Atlanta Water Works office, approximately:
>
> Fifteen hundred feet 12-inch pipe, also about 10,000 feet of pipe varying from 6 to 10 inches, with a lot of special castings. They state that they are not prepared to give amount of different sizes, but will give order in good time after contract has been awarded. They ask for reply on or before the 18th instant, and you will therefore please advise us at once as to what price you desire us to protect on this contract.

To this Anniston replied the same day (Rec., p. 83):

> Please protect $24 on approximately 375 tons of cast-iron pipe for the city of Atlanta, Ga., on which we are asked to-day for prices. *We have sent a man over to Atlanta and will get as much more as possible.*

This price was nearly $10 per ton (less cost of transportation) over what would be a paying profit at Chattanooga (see Thommasson's letter, Rec., top p. 94). Chattanooga, however, on February 17, protected Anniston by bidding $24.50 per ton delivered on board cars at Atlanta, saying with refreshing ingenuousness, "We can give you a prompt delivery on above pipe, *and would be pleased to receive your order.*"

A lower bid had been received from R. D. Wood & Co., of Philadelphia, Pa., but all bids were rejected by the Atlanta people, as they were "extremely high" (Rec., p. 83). The bids thus rejected gave a good example of the method by which these companies "protected" each other, and incidentally led the consumer to suppose the prices reasonable. They were (Rec., p. 44):

Anniston, $24; Bessemer, $24.25; South Pittsburg, $24.25; Chattanooga, $24.50.

The bids being rejected, the Atlanta waterworks wrote Chattanooga, and Chattanooga forwarded the letter to Anniston in the following communication of February 21, 1896 (Rec., pp. 83, 84):

> We have received the following letter under date of February 19, 1896, from the Atlanta waterworks office:
>
> "ATLANTA, GA., *February 19, 1896.*
>
> "Bids for pipe were opened at the meeting of board of water commissioners this a. m., and as all bids *were*

extremely high, it was moved and adopted that all bids be rejected. Will say that the lowest bid was from R. D. Wood & Co., Philadelphia, Pa. Under such circumstances we would ask if it is not possible for a lower bid to be made *from those who are so near this point, you might say right at our door.* Hoping to hear more favorably from you at an early date, we remain, with much respect,

"Very truly, yours,

(Signed) "W. B. TARBETT, *Sec'y.*"

We wired you promptly and we have your reply, stating *to stand pat on our price* and that your representative goes there this evening. To all appearances you were not at this letting at Atlanta or I could not think that R. D. Wood & Co. would have been the lowest bidder, and yet it is quite a surprise to me that they rejected all bids received, and still they act magnanimous when they ask if it is not possible for a lower bid to be made from those so near their very door. I regret very much that you have not posted us on this matter, for you no doubt knew the condition of affairs, and I prefer receiving from you than from the Atlanta Water Works themselves.

Anniston had already telegraphed Chattanooga (Rec., p. 84):

Stand pat on your price. Our representative goes there this evening.

In answer to a communication from Bessemer, Anniston wrote it on February 24, 1896 (Rec., bottom p. 84):

Your letter of the 22d instant received, and we wired you this morning: "Atlanta job postponed until March 4; have written you fully." In reply will say that we believe we made a mistake in trying to get $24 for pipe and 2½ cents for specials, but

there would have been no difficulty in this respect had we not run up against R. D. Wood & Co.'s man there, putting in his bid for hydrants; and he also put in a bid for the pipe and specials at the last moment. Our representative called on the water company on Saturday, the 22d, and found Wood & Co.'s man on the—they stated it was their belief that the four Southern shops have an arrangement by which Anniston is to get the work. In other words, that we have a combination between us, and if they can find it out positively they will never receive a bid from any of us again. We think the best thing we can do is to have a representative from each of the four Southern shops on the ground on March 4, the date fixed for next letting, and dispose of the matter. In addition to asking for prices for the present lot of pipe they will ask for bids for the year's supply, consequently it is very important we all be on hand and take this matter up vigorously with them and see if we can not satisfy them on the subject of the combine.

(Signed) ——— ———, *V. P.*

NOTE.—J. K. Dimmick is vice-president Anniston works.

McC.

The Anniston company's report from its agent at Atlanta is given in full at pages 85 to 86 of the record. Besides the Philadelphia man he met Mr. Torbett, secretary of the water board; Mr. Erwin, one of the water commissioners, and Colonel Woodward, superintendent of the waterworks. He told the city council that "the ruling market price would be about $24," and got a favorable resolution through the council without a dissenting vote. (Rec., p. 85.) The Philadelphia man,

however, at the last moment put in a bid for $23. The threat against the four Southern shops came from Mr. Erwin, and Colonel Woodward also advised the rejection of all bids. The Colonel's advice may have been on the ground that "he promised me when there last he would give us another chance in the event we were not the lowest bidders." In other words, he knew that the Anniston company could afford to furnish the pipe at a lower price than what they were asking as "the ruling market price." It is not surprising that the Colonel appears as an affiant on behalf of the Anniston company, maintaining that its prices were "fair, reasonable, and moderate" (Rec., pp. 166, 167), while perhaps it may be surprising that Mr. Erwin fell in line with him (p. 169). Negotiations were opened with the Philadelphia concern to prevent its appearance at the second bidding (p. 87).

On April 10 (Rec., p. 50) the contract was let to the Anniston Company at $22.75 for the year's supply and $22 for some "special shipments." Assuming the cost with a fair profit at Anniston to be substantially the same as at Chattanooga, and assuming the freight from Anniston to be $1.60 per ton (p. 76), this made a price of about $6.75 per ton over and above a fair and reasonable profit. This seems to be an underestimate, because we find the following entry in the minutes of the Associated Pipe Works of March 13, 1896 (Rec., p. 76):

> Moved, that "bonus" on Anniston's Atlanta waterworks contract be fixed at $7.10, provided freight is $1.60 a ton. Carr'ed.

Before payment was made by the Atlanta Water Works an investigation was had, based upon charges by the same man whose information led to the present suit. The charges were referred to a special committee, consisting of Messrs. Erwin, Torbett, and Hass, on May 18, 1896 (Rec., p. 168). The city's attorneys had advised that the city could recover in a suit against the Anniston works (Rec., p. 170). The committee, however, unanimously overruled the attorneys after telling the officers of the Anniston company (Rec., pp. 169–174).

In the course of the correspondence between members of the association relative to the action of the Atlanta authorities in rejecting all bids, the following letter was written on February 25, 1896, by Thomasson, of the Chattanooga works, to Anniston (Rec., pp. 86, 87):

CHATTANOOGA, TENN., *Feb'y 25, 1896.*

Mr. J. K. DIMMICK, V. P., AND ALL CONCERNED.

GENTLEMEN: We are in receipt of a carbon copy of your favor of the 24th instant to F. B. Nichols, V. P., in reference to Atlanta, Ga. We certainly regret that the matter has assumed its present shape and that R. D. Wood & Company should make a lower bid by one dollar a ton than the Southern shops. You know we have always been opposed to special customers and "reserved cities," we do not think that it is the right principle, and we believe that if the present association continues, that all special customers and "reserved cities" should be wiped out; there is no good reason why we should be allowed to handle New Orleans, you Atlanta, Howard-Harrison Iron Co., St. Louis, or South Pittsburg, Omaha. We are not in the business to award special privileges to any foundry and we

believe that the result would be more benefit to all concerned if all business was made competitive. It is hardly right, and we believe if you will think over the matter carefully, you will concede it, for us to be put into a position of being unable to make prices or furnish pipe for the city of Atlanta, when we have always heretofore had a large share of their trade. *We can not explain our position to the Atlanta people and we consider it is detrimental to our business and think no combination should have the power to force us into such a position.* The same argument will apply with you as to New Orleans, St. Louis, and other places. We think this matter should be considered seriously and some action taken that will result in reestablishing ourselves (I mean the four Southern shops), in the confidence of the Atlanta people. Wistar, R. D. Wood & Company's man has no doubt told them all about our association, or as much as he could guess, and has worked up a very bitter feeling against us. The very fact that you have been protected and have had all their business for the past two years is proof to them that such a "combination" exists, and as they state that if they find out positively that we are working together, they will never receive a bid from any one of us again. We can not afford to leave these people under that impression, and something ought to be done that would disprove Mr. Wistar's statement to them. We believe that all business ought to be competitive. The fact that certain shops have certain cities "reserved" is all based upon mere sentiment and no good reason exists why it should be so. *We believe that as a general thing we have had our prices entirely too high and especially do we believe this has been the case as to prices in "reserved cities." The prices made at St. Louis and Atlanta are entirely out of all*

reason, and the result has been and always will be, when high prices are named, to create a bad feeling and an agitation against the "combination." There is no reason why Atlanta, New Orleans, St. Louis, or Omaha should be made to pay higher prices for their pipe than other places near them, who do not use anything like the amount of pipe and whose trade is not as desirable for many other reasons. There is no sentiment existing with us in reference to Atlanta, as we would as soon sell our pipe anywhere else, only as stated above it is wrong in principle that we should be forced to give up Atlanta or any other point for no good reason that we know of.

Very truly, yours,

CHATTANOOGA FDY. & PIPE WORKS,

By E. B. THOMASSON.

For other facts shown in the record respecting the operation of the combination, its purpose and effect, I refer to extracts from Mr. Whitney's brief below, printed in the Appendix.

The following letter is of especial interest (Rec., p. 93):

CHATTANOOGA, TENN., *Jan'y 2, 1896.*

Mr. W. H. FLINT, *Cincinnati, O.*

DEAR SIR: Referring to our policy for 1896 in bidding on pipe, we have had this matter under consideration for some time past, and from the information obtained from Mr. Thornton's statement as to the amount of business done last year in pay territory and from estimates that we have made for business that will come into that territory for 1896, we have been unable to determine to what point we could bid on work and take contracts; and if bonus is forced above this point, let it go and take the

bonus. We note from your letter of yesterday that you have sized up the situation in its essential points, and it agrees exactly with our ideas on the subject. It is useless to argue that Howard-Harrison Iron Co., Cincinnati, and other shops, who have been bidding bonuses of *six or eight dollars per ton*, can come out and make any money if they continue to bid such bonus. In the case of the Howard-Harrison Iron Co. people, on Jacksonville, Florida. The truth of the business is they are losing money at the prices they bid for this work. *If they take the contract at $19, delivered, it will only net $16 at the shop after they have paid back the bonus of $4.75;* if they should continue to buy all the pipe that goes up to such figures as they have paid for Jacksonville and other points, they would wreck their shop in a few months. However, they, of course, calculate this bonus will be returned to them on work taken by other shops. We are very much pleased with the bonus that has been paid, and we only hope they will keep it up, as it is only money in our pockets. As long as there is no money to us let them make the pipe, as we shall continue to do so.

For the present you will adopt the following basis:

On 16″ and under standard weights, *$14.25 at shop.*

On 18″ and 36″ standard weights, *$13.*

On 16″ and under light weights, *$14.50 to $14.75 at shop.*

That is, you will bid all over *$13, $14.25, and $14.50 on work. If* we get work at these prices, it will be satisfactory. If the *others run bonus above this point, let them take it, as it will be more money to us to take the bonus.*

We note Mr. Thornton's report of average premiums from June 1 to Dec. that the average was

$3.63. *The average bonuses that are prevailing to-day are 7 to 8 dollars.* We can not expect this to continue, and we think your estimate of $6-ton average bonus is high, as we do not believe the premiums of '96 will average that price, unless there is a decided change for the better in business. We find there was sold and shipped into pay territory from Jan'y 1, 1895, to date, including the 40,000 tons of old business that did not pay a bonus, about 188,000 tons, and we think a very conservative estimate of shipments into this territory will amount to fully 200,000 this year, more than that *probably overrun 240,000 tons*, from the fact that the city of Chicago and several other places that annually use large quantities of pipe were not in the market last year or last season, from the fact that they were out of funds. On the basis as given you above if the demand should reach 220,000 tons, which would give us our entire 40,000 tons, provided we did no business, then the association would *pay us the average "bonus" which might be from $3.50 to $5 on our 40,000.* If we can not secure business in "pay territory" at paying prices, we think we will be able to dispose of our output in "free territory," and of course make some profit on that.

At the prices that Howard-Harrison people paid for Jacksonville, Des Plaines, and one or two other points, they are losing from $2.50 to $3 per ton; that is, provided "bonuses" would not be returned to them. Therefore when business goes at a loss we are willing that the other shops make it.

Just a few minutes ago we had a telegram from Nichols, at Jacksonville, stating that he could secure contract for water pipe at $19 and $19.19 for the sewer pipe, and wanted to know how much small pipe we would furnish. We replied at once we did

not want any of the business. He furthermore states that unless he takes contracts at these prices that the job will be advertised.

We await with some interest the outcome of this matter, as to whether Mr. Nichols will take the job or whether he will throw it off and let it come to a reletting.

Very truly, yours,

CHATTA. FDY. & PIPE W'KS.
By E. B. THOMASSON.

P. S.—Do not leave this letter on your desk where it might fall into the hands of others. Make a memorandum and tear the letter up. Above all things, make a confidant of no one in business matters.

ARGUMENT.

The act of July 2, 1890 (26 Stats., 209), entitled "An act to protect trade and commerce against unlawful restraints and monopolies," provides:

> SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.
>
> * * * * *
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, etc.
>
> SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the

United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition, setting forth the case, and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed as soon as may be to the hearing and determination of the case; and pending such petition and before final decree the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

* * * * *

SEC. 8. That the word "person" or "persons," wherever used in this act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

This statute has been before this court in the following cases:

U. S. v. *Knight Co.*, 156 U. S., 1;
U. S. v. *Freight Association*, 166 U. S., 290;
U. S. v. *Joint Traffic Association*, 171 U. S., 505;
U. S. v. *Hopkins*, 171 U. S., 578;
Anderson v. *U. S.*, 171 U. S., 604.

In the Knight Case there was involved a monopoly in the manufacture of sugar, commonly known as the sugar trust; in the Freight Association and Joint Traffic Association cases agreements among interstate railways to fix and maintain rates and fares, and in the Hopkins and Anderson cases two live stock exchanges located in Kansas City.

In the Knight Case the court held that the creation of a monopoly in production did not operate directly as a restraint upon interstate trade or commerce. In the Freight Association Case the court held that the antitrust law applies to railroads, and that it prohibits *all* agreements in restraint of interstate trade and commerce, whether the restraint be reasonable or unreasonable. This was followed by the Joint Traffic decision, the court holding in addition that the antitrust law is valid and constitutional, and that Congress has the power to say that a contract or combination shall not be legal which restrains trade and commerce among the several States by shutting out the operation of the general law of competition. In the Hopkins Case it was held that the business of the members of the Kansas City Live Stock Exchange was not interstate commerce within the meaning of the antitrust law, and therefore the agreement creating that exchange did not operate to restrain trade or commerce among the several States. In the Anderson Case the court took the view that whether the members of the Traders' Live Stock Exchange, of Kansas City, were or were not engaged in interstate commerce, the agreement creating the exchange was not one in restraint of such trade.

The present case presents to the court for the first time a combination among competing shops, located in different States, which directly affects trade or commerce among the several States in the article they manufacture, namely, cast-iron pipe, mainly used by municipal corporations for gas, water, and sewer purposes. I contend:

First. The agreement is in restraint of trade, because it suppresses competition and arbitrarily fixes prices. It does this with respect to a commodity, cast-iron pipe, mainly used for public purposes and purchased by municipalities at public lettings after advertisements for bids; and it does this while fraudulently retaining a show of competition for the purpose of deceiving the public.

Second. The trade or commerce thus restrained is trade or commerce among the several States.

The agreement regulates such trade and directly affects it. It puts a restraint upon the trade among the several States in cast-iron pipe. The restraint is upon competition and directly affects interstate sales and the prices to be charged thereat.

I.

In the able opinion by Judge Taft (Rec., pp. 293–327), there is a learned and elaborate review of the authorities respecting what constituted a contract in restraint of trade at common law (Rec., pp. 303–316). I shall not go over this ground. If the antitrust law applied only to contracts in unreasonable restraint of trade this agreement must fall, for it is unconscionable. No court ever sustained an agreement like this. It is not only a combination to throttle competition, but a conspiracy to defraud the people in the letting of public contracts.

The answer of the members of the combination says (Rec., p. 29) that it is true "that all contracts secured by them were, in the main, contracts to furnish pipe to gas, water, and municipal corporations, let to the lowest bidders after advertising for bids." It may be suggested

that contracts for pipe for gas, water, and sewer purposes are thus let because the law requires it, to prevent corruption among public officials and to secure the people the benefit of competition. The answer goes on to say:

> Previous to December 28, 1894, or about that date, defendants had bid on such occasions against each other and other companies proposing to take such contracts, and *the competition provoked by this mode of dealing* secured to said gas, water, and municipal corporations the advantage of ruinous competition to the bidders, while said bidders had no other market in which to dipose of their product.

Such was the situation to be met, and such the evil to be remedied. The contracts being public in character, the law required open competition. To circumvent the law, the combination was formed. The answer goes on to say:

> *To meet this situation*, defendants joined an association for their mutual protection in lessening expenses, securing better freight rates, etc.

The evil was competition; the remedy, according to the answer, an association "for lessening expenses, securing better freight rates, etc." The true purpose of the association is indicated by the abbreviation "etc." This means to prevent "ruinous competition." All such combinations are formed for that purpose.

Later in the answer (Rec., p. 32), in describing why the "auction pool plan" was adopted, this language is used:

> From this manner in which gas, water, and municipal corporations procured their supply of pipe, a

> few manufacturers could secure all the orders and drive the others out of business, and the inevitable result was not to promote competition, but to destroy the industry. They aver that it was *to guard against competition* which was unfair and ruinous, * * * that the arrangement of May 27, 1895, was made.

Here is a frank expression. The object of the association from the first was to guard against and suppress the open competition which the law demanded in letting public contracts for cast-iron pipe for gas, water, and sewer purposes. This was the object and purpose of the combination. What was the plan? The original plan of December 28, 1894, provided for a fixed bonus on each contract in the pay territory.

The pay territory was the competitive territory, the territory in which these shops were the principal source of supply. It covered more than three-fourths of the United States, all west and south of New York, Pennsylvania, and Virginia. On every contract in this territory, the shop that secured it had to pay from $1 to $4 a ton to the association, for distribution among the shops according to their estimated tonnage capacity. The requirement of a bonus was to remove the motive for competition. The division of the bonus was a division of profits. The company that has to share its profits is not so eager to do the work. The pooling of freight and the division of earnings were prohibited by the anti-poolings provisions of the interstate-commerce act (sec. 5), because they are used to suppress competition and maintain arbitrary rates. The fixed bonus plan was, so far as it went, a provision for a division of profits. Its

object was to suppress competition and maintain arbitrary prices.

Along with the fixed bonus provision went the reserved cities plan. The leading cities in the territory were divided up among the shops.

The Cincinnati shop was to handle the business of Cincinnati, Covington, and Newport.

The Louisville shop, that of Louisville, Jefferson, and New Albany.

The Anniston shop of Alabama, that of Anniston and Atlanta.

The Chattanooga shop, that of Chattanooga and New Orleans.

The Bessemer shop of Alabama, that of Bessemer and Birmingham and St. Louis.

The South Pittsburg shop of Tennessee, that of Omaha, Nebr.

These cities, in every one of which the law required contracts for cast-iron pipe to be let after advertisement upon open competition, were parceled out among the members of the association. The shop that owned a city fixed the price. It notified the other shops of its price and they had to protect it by bidding over. This was a deliberate conspiracy to deceive and defraud. The city authorities supposed they were getting genuine bids. They supposed there was the competition which the law requires. They were deceived. There was no competition. The matter was all fixed up beforehand. The bids were collusive and fraudulent. The contract secured was illegal and void. And it was to do this sort of thing that the combination was formed.

But the fixed-bonus plan did not result "in the advancement in the prices of pipe anticipated," and so, on May 27, the auction-pool plan was adopted. Under this plan (R., p. 71) "all competition on the pipe lettings shall take place among the various pipe shops prior to the said letting." To accomplish this, all inquiries for pipe were to be referred to a board composed of one representative from each of the "six competitive shops." The board fixed the price for the pipe, and then the representatives bid against one another for the order, the shop offering the biggest bonus to get the job. The resolution provided that "the party securing the order shall have the protection of all the other shops." In other words, all the other shops were to bid over the price fixed by the board.

It is interesting to read what the defendants say about this arrangement. (R., p. 32.) They aver it was made "to guard against competition which was unfair and ruinous." As to the mode of operation, they say (Rec., p. 32):

> On receiving notice that a contract for pipe was to be let, their representatives, who were experienced in defendants' line of business, and knew the cost of pipe, the state of supply and demand at the time, and what would under all circumstances be a fair and reasonable price on the contract offered, * * * *did jointly agree in advance on such a price.*

Here is an express admission that the combination was formed for the purpose of fixing the price of cast-iron

pipe arbitrarily, in advance of the public letting under the law. The answer continues (Rec., p. 32):

> After said price was agreed on the question arose as to which of said defendants should have the preference as among themselves, in the bidding thereafter to occur in letting the contract. This was determined by the largest premium of those offered by each, to be charged as hereinbefore alleged. * * * The price agreed on * * * did not in fact fix or regulate the price at which contracts were obtained, but was only adopted as a fair price, and constituted a basis upon which the defendants could *intelligently compete* among themselves and determine who should endeavor to secure the order.

This was indeed "intelligent" competition; the intelligence of the gang that loots the public by deliberate prearrangement.

In discussing whether this combination is in restraint of trade, I have confined myself to the meaning and effect of the agreement itself.

> Although the case is heard on bill and answer, thus making it necessary to assume the proof of the allegations in the answer, which are well pleaded, yet the legal effect of the agreement itself can not be altered by the answer, nor can its violation of law be made valid by allegations of good intention or of desire to simply maintain reasonable rates. * * * In the view we have taken of the question the intent alleged by the Government is not necessary to be proved. The question is one of law in regard to the meaning and effect of the agreement itself, namely: Does the agreement restrain trade or commerce in any way so as to be a violation of the act? (*U. S. v. Freight Association*, 166 U. S., 290, 341.)

While I have purposely limited my own discussion to the agreement itself and its necessary operation and effect, the record is full of evidence as to what was actually done under this combination. I have for the convenience of the court printed in the statement extracts from the testimony in the record respecting the practical working of the agreement and its effect upon prices. In the appendix I print some extracts from Mr. Whitney's brief below. I close the discussion under this point by quoting what Judge Taft says as to the operation of the agreement (Rec., pp. 316–318):

> The defendants, being manufacturers and vendors of cast-iron pipe, entered into a combination to raise the prices for pipe for all the States west and south of New York, Pennsylvania, and Virginia, constituting considerably more than three-quarters of the territory of the United States, and significantly called by the associates "pay" territory. Their joint annual output was 220,000 tons. The total capacity of all the other cast-iron pipe manufacturers in the "pay" territory was 170,500 tons. Of this, 45,000 tons was the capacity of mills in Texas, Colorado, and Oregon, so far removed from that part of the "pay" territory where the demand was considerable that necessary freight rates excluded them from the possibility of competing, and 12,000 tons was the possible annual capacity of a mill at St. Louis, which was practically under the same management as that of one of the defendant's mills. Of the remainder of the mills in "pay" territory and outside of the combination, one was at Columbus, Ohio, two in northern Ohio, and one in Michigan. Their aggregate possible annual capacity was about one-half the usual annual output of the defendant's mills. They

were, it will be observed, at the extreme northern end of the "pay" territory, while the defendant's mills at Cincinnati, Louisville, Chattanooga, and South Pittsburg, and Anniston and Bessemer were grouped much nearer to the center of the "pay" territory. The freight upon cast-iron pipe amounts to a considerable percentage of the price at which manufacturers can deliver it at any great distance from the place of manufacture. Within the margin of the freight per ton which Eastern manufacturers would have—pay to deliver pipe in "pay" territory, the defendants, by controlling two-thirds of the output in "pay" territory, were practically able to fix prices. The competition of the Ohio and Michigan mills, of course, somewhat affected their power in this respect in the northern part of the "pay" territory, but the farther south the place of delivery was to be, the more complete the monopoly over the trade which the defendants were able to exercise within the limit already described. Much evidence is adduced upon affidavit to prove that defendants had no power arbitrarily to fix prices and that they were always obliged to meet competition. To the extent that they could not impose prices on the public in excess of the cost price of pipe, with freight from the Atlantic seaboard added, this is true, but within that limit they could fix prices as they chose. The most cogent evidence that they had this power is the fact, everywhere apparent in the record, that they exercised it. The details of the way in which it was maintained are somewhat obscured by the manner in which the proof was adduced in the court below upon affidavits solely and without the clarifying effect of cross-examination, but quite enough appears to leave no doubt of the ultimate fact.

The defendants were by their combination therefore able to deprive the public in a large territory

of the advantages otherwise accruing to them from the proximity of defendants' pipe factories, and by keeping prices just low enough to prevent competition by Eastern manufacturers, to compel the public to pay an increase over what the price would have been if fixed by competition between defendants, nearly equal to the advantage in freight rates enjoyed by defendants over Eastern competitors. The defendants acquired this power by voluntarily agreeing to sell only at prices fixed by their committee, and by allowing the highest bidder at the secret "auction pool" to become the lowest bidder of them at the public letting. Now, the restraint thus imposed on themselves was only partial. It did not cover the United States. There was not a complete monopoly. It was tempered by the fear of competition, and it affected only a part of the price. But this certainly does not take the contract of association out of the annulling effect of the rule against monopolies. In *United States* v. *E. C. Knight Company* (156 U. S., 1, 16), Mr. Chief Justice Fuller, in speaking for the court, said: "Again, all the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition."

It has been earnestly pressed upon us that the prices at which the cast-iron pipe was sold in "pay" territory were reasonable. A great many affidavits of purchasers of pipe in "pay" territory, all drawn by the same hand or from the same model, are produced, in which the affiants say that in their opinion the prices at which pipe had been sold by defendants had been reasonable. We do not think the issue an important one, because, as already stated, we do not

think that at common law there is any question of reasonableness open to the courts with reference to such a contract. Its tendency was certainly to give defendants the power to charge unreasonable prices, had they chosen to do so. But, if it were important, we should unhesitatingly find that the prices charged in the instances which were in evidence were unreasonable. The letters from the manager of the Chattanooga Foundry, written to the other defendants and discussing the prices fixed by the association, do not leave the slightest doubt upon this point and outweigh the perfunctory affidavits produced by the defendants. The cost of producing pipe at Chattanooga, together with a reasonable profit, did not exceed $15 a ton. It could have been delivered at Atlanta at $17 to $18 a ton, and yet the lowest price which that foundry was permitted by the rules of the association to bid was $24.25. The same thing was true all through "pay" territory to a greater or less degree, and especially at "reserved" cities.

II.

1. The trade or commerce restrained by the agreement or combination was trade or commerce among the several States. The agreement regulates such trade and directly affects it. The restraint is not an indirect result of the agreement. The manifest intention of the combination was to put a restraint upon trade among the several States in cast-iron pipe. The restraint was upon competition and directly affected interstate sales and the prices to be charged at interstate sales. The natural operation of the law of competition in interstate business among these six shops, located in four different States,

and operating in a pay territory composed of thirty-six States, was purposely and intentionally restrained and suppressed by this arrangement.

It is impossible to suggest a contingency in which the agreement would have a purely local operation. Even in the case of a local sale, as a sale by the Addyston Company of pipe to Cincinnati, there would be a restraint upon interstate trade because the agreement prohibits the other five shops, located outside of Ohio, from bidding on such contract, that is, from selling their pipe to Cincinnati. Such a sale by a shop outside of Ohio to Cincinnati would be interstate commerce; therefore the agreement puts a restraint upon such commerce. Moreover, in every instance there is an interference with the law of competition and an arbitrary regulation of the price to be charged. Let us revert to the arrangement.

The shops were located, two in Alabama, two in Tennessee, one in Kentucky, and one in Ohio. The pay territory, in which sales were regulated, included thirty-six States. The cities "reserved" were:

Atlanta and Anniston, Ala., to the Anniston, Ala., shop;

New Orleans and Chattanooga, to the Chattanooga shop;

St. Louis and Birmingham to the Bessemer, Ala., shop;

Omaha, to the South Pittsburg, Tenn., shop;

Louisville, New Albany, and Jeffersonville, to the Louisville shop; and

Cincinnati, Newport, and Covington, to the Cincinnati shop.

Under the auction-pool plan of May 27, 1895, all inquiries, except in reserved cities, were referred to the "representative board," which fixed the price, and then bid against one another for the job, the biggest bonus to get it. (Rec., p. 70.)

In the case of reserved cities, the successful bidder being already determined, the price and bonus was to be fixed at a regular or called meeting of the principals. (Rec., p. 72.)

Thus the agreement or combination restrained every defendant, except the one selected to take the contract, from bidding in good faith for or making it, and restrained the chosen shop from making the contract, except at the arbitrary price fixed by the combination. With respect to pipe to be shipped to any of the thirty-six States constituting "pay territory," except Alabama, Tennessee, Kentucky, and Ohio, the combination restrained five of the defendants from soliciting or making an interstate sale, and restrained the sixth one from soliciting or making an interstate sale below a fixed price.

With respect to sales in the four States in which the shops were located the combination restrained at least three, sometimes four, and sometimes five of the defendants from making or soliciting an interstate sale, and if the contract happened to be allotted to a shop outside of the State where the pipe was to be shipped the combination restrained the making of an interstate contract below a fixed price. It is clear, therefore, that no sale, or contract to sell, or proposal to sell, can be suggested within the scope of the agreement, with respect to which

the combination did not restrain at least three, often four, more often five, and usually all of the defendants from the free exercise of the right, which the antitrust law was intended to protect, of selling their products in States other than their own at whatever prices they might see fit.

2. Yet it is contended that this agreement and combination put no restraint upon interstate trade or commerce. What is interstate trade or commerce? It is trade or commerce among the several States. And what is that? Intercourse and traffic. The transmission of intelligence (96 U. S., 1, 9), the transit of persons, the purchase, sale, and exchange of commodities, the transportation of property.

> Commerce, "undoubtedly, is traffic, but it is something more; it is intercourse." (Mr. C. J. Marshall, *Gibbons* v. *Ogden*, 9 Wheaton, 1, 189.)

In the *Knight Case* (156 U. S., 1), Mr. C. J. Fuller, defining the limits of the power vested in Congress to regulate commerce, says, page 13:

> *Contracts to buy, sell, or exchange goods* to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce.

In the recent case of *Hopkins* v. *U. S.* (171 U. S., 578), this court speaking by Mr. Justice PECKHAM, said, page 597:

> Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know

> from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale and exchange of commodities between the citizens of different States, and the power to regulate it embraces all the instruments by which such commerce may be conducted (citing cases).

In the Knight Case, the monopoly related only to the production of sugar. The fact that goods which are manufactured may subsequently be sold and transported into another State does not make such goods the subject of interstate commerce until actually in transit. In the present case, however, it is not the cast-iron pipe which, according to our contention, is the part of interstate commerce regulated and restrained by the combination, but it is the contracts to sell such pipe among the several States. Such contracts constitute trade or commerce among the several States. The goods covered by interstate contracts do not become a part of interstate commerce until they are put in the way of transit; then they pass beyond the control of the State and under the control of the General Government, and they remain under such control until they become a part of the common mass of property in the State to which shipped.

I concede that under the rule laid down in *Coe* v. *Errol* (116 U. S., 517) and *Kidd* v. *Pearson* (128 U. S., 1) goods do not become the subject of interstate commerce and under the protection of the General Government until actually in course of transportation from one State to another. The intention to ship the goods to another State, as in *Coe* v. *Errol*, or the manufacture of goods

for export to another State, as in *Kidd* v. *Pearson*, does not prevent the State in the first case from taxing the goods, or in the second case from prohibiting their manufacture. But trade among the several States is the making of sales as well as the delivery of the goods. Primarily, to trade is to buy and sell; the delivery follows. The negotiations of sales, the making of contracts to sell, goods to be shipped from one State to another, is interstate commerce. Local laws placing a tax, a burden, or restraint upon such interstate commerce have repeatedly been declared invalid by this court.

In *Robbins* v. *Shelby Taxing District* (120 U. S., 489) this court held that a Tennessee law, requiring a drummer to pay a tax for the privilege of soliciting sales of goods for a Cincinnati firm was invalid, because it put a burden upon interstate commerce. Mr. Justice Bradley, speaking for the court, said, page 494:

> In view of these fundamental principles, * * * we may * * * inquire whether it is competent for a State to levy a tax or impose any other restriction upon the citizens or inhabitants of other States, for selling or seeking to sell their goods in such State before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer, or a merchant, of one State, to sell his goods in another State, without, in some way, obtaining order therefor?

Again, page 497:

> *The negotiation of sales of goods* which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce.

The decision in Robbins's Case has been followed in *Corson* v. *Maryland* (120 U. S., 502); in *Asher* v. *Texas* (128 U. S., 129); in *Stoutenburg* v. *Hennick* (129 U. S., 141); and in *Brennan* v. *Titusville* (153 U. S., 289). In Corson's Case, a Maryland law was held invalid, under which a resident of New York was indicted for offering to sell goods for a New York firm in Baltimore without a license. In Asher's Case, a New Orleans drummer was imprisoned for soliciting orders in Texas without a license. In Stoutenberg's Case, the license tax on the foreign drummer was levied by the District of Columbia. Brennan's Case involved the validity of an ordinance of Titusville, Pa., under which a license tax was imposed for soliciting orders for picture frames and portraits to be made in Chicago and shipped to Titusville. Mr. Justice Brewer, speaking for the court, said, bottom page 297, 298:

> The question in this case is whether a manufacturer of goods, which are unquestionably legitimate subjects of commerce, who carries on his business of manufacturing in one State, can send an agent into another State to solicit orders for the products of his manufactory without paying to the latter State a tax for the privilege of thus trying to sell his goods. It is true, in the present case, the tax is imposed only for selling to persons other than manufacturers and licensed merchants; but if the State can tax for the privilege of selling to one class, it can for selling to another, or to all. In either case it is a *restriction on the right to sell*, and a burden on lawful commerce between the citizens of two States.

It is too often forgotten, to use the language of Mr. Justice Bradley in the Robbins Case (120 U. S., bottom 496):

> That the people of this country are citizens of the United States, as well as of the individual States, and that they have some rights under the Constitution and laws of the former independent of the latter, and free from any interference or restraint from them.

The right to trade among the several States, without restriction or imposition, is guaranteed by the Constitution. This right includes, indeed is based primarily on, the right to sell goods for delivery from one State to another. The antitrust law was passed to preserve this freedom to persons and corporations and strike down all restraints put upon it by combinations or conspiracies. The right of persons and corporations to sell their goods in other States and to ship them there, freely and without restraint, is one in which not only the seller but the public is interested.

3. The combination which puts a restraint upon interstate sales violates the antitrust law just as much as one which puts a restraint upon interstate transportation. The sale precedes the transportation, but is as much interstate commerce. A combination designed to suppress all competition in the sale of goods among the several States, and arbitrarily to fix and maintain the price in all such sales, is as hostile to the public interests as a combination to suppress competition among interstate railways and fix rates and fares upon persons and property transported. It all amounts to the same thing in

the end. The court can take care of restraints and burdens upon interstate commerce by States and municipalities. Congress, by the antitrust law, sought to take care of restraints put there by persons and corporations, through combination and conspiracy. Congress intended to preserve the freedom of trade and commerce among the several States. Competition goes along with such freedom. If you suppress competition, you no longer have freedom, but restraint.

In the recent case of *United States* v. *Joint Traffic Association* (171 U. S., 505), Mr. Justice Peckham, speaking for the court, said, top page 577:

> The natural, direct, and immediate effect of competition is, however, to lower rates, and thereby to increase the demand for commodities, the supplying of which increases commerce, and an agreement, whose first and direct effect is to prevent this play of competition, restrains instead of promoting trade and commerce.

This language, mutatis mutandis, applies to the case before the court. The direct and immediate effect of competition among manufacturers of cast-iron pipe is to lower prices, and thereby increase the demand for such product. There is no lack of need in the cities for water, gas, and sewer pipe; the lack is of money to purchase such pipe. The lower the price, the farther the money will go, and the more pipe will be purchased and shipped, to the increase of commerce among the several States.

4. It is objected that the agreement between the six shops did not amount to a transaction in interstate commerce, and therefore could not operate as a restraint upon

such commerce. At the most, it was simply an arrangement among manufacturers and sellers of cast-iron pipe. The purchasers of cast-iron pipe were not parties to the agreement. The agreement ended when the price for a contemplated contract was fixed and the successful bidder determined; but at this point there was no contract for the sale and delivery of pipe from one State to another, and at this point the operation of the agreement ended. Therefore, it is contended, the agreement does not directly affect interstate commerce.

The same argument would have applied in the Trans-Missouri and Joint Traffic cases. The agreements held invalid in those cases were agreements among the carriers alone. The shippers were not parties to the agreements. Each agreement between competing railroads engaged in interstate commerce created a central authority with power to establish and maintain rates and fares. The fixing of rates and fares is not in itself an act of interstate commerce. It simply amounts on the part of the railroad companies to an offer or proposition to transport persons or property at a certain rate. Interstate commerce, in the case of railways, does not begin until the passenger or shipper takes a hand. Then the contract for passage or transportation is made. The traffic agreements were held to be in restraint of trade because they prevented competition among the railroads and arbitrarily fixed the rates and fares to be charged shippers. They did not, however, make or assume to make contracts with shippers.

So, in the present case, while the agreement attacked is between the makers and sellers of cast-iron pipe, its

subject is interstate sales. The subject of the agreement between the railway corporations was contracts to transport goods among the several States; the subject of the agreement among these manufacturing corporations was contracts to sell goods among the several States. The restraint imposed in each case was upon interstate commerce, for a sale of goods in one State to be shipped to another is no less an act of interstate commerce than the transportation of the goods themselves.

5. It is urged that the agreement under examination was simply one to collect and divide a bonus among the members of the association. It had no other purpose or effect. But why divide a bonus? The bonus was not the end but the means of the combination. Like the division of earnings among competing railroads, the division of the bonus was intended to suppress competition among these shops in the pay or competitive territory. It was thought that the competition would be lessened, if not suppressed, by requiring the successful bidder to pay a fixed amount per ton into the common treasury for division among the members of the association. Thus the successful bidder would be compelled to share the profits, to a certain extent, with his natural competitors. This, of course, would lessen the motive for competition.

The fixed bonus system did not, except in the reserved cities, result in "the advancement in the prices of pipe, as was anticipated" (Rec., p. 70). Therefore the auction-pool plan was adopted. The statement in the resolution adopting the auction-pool plan that the fixed-bonus plan had not resulted in the advancement in prices anticipated is a clear and conclusive admission that the

fixed-bonus plan—in other words the association itself—was created to advance the price of pipe. The reason why the fixed-bonus plan did not advance the price of pipe in the way anticipated is plain. Under the fixed-bonus plan there was competition between the shops. Each sought to get the job, the only condition being that the fixed bonus, which ran from $1 to $4 a ton (Rec., p. 66), should be paid for division among the members. There was no provision for fixing in advance the price of the pipe to be sold under the fixed-bonus plan. The price was fixed by competition; a bonus then had to be paid.

Now, the reserved-city plan had fulfilled all the expectations of the originators of the association. It had resulted in the advancement of prices, as anticipated. Why? Because under the reserved-city plan the price was fixed by the shop to which the city was allotted. It fixed its price knowing there would be no competition from the other members of the association. After fixing the price it notified the other members, and they were compelled to protect its price by bidding a higher amount. The advancement in the price of pipe was thus secured. But the result of this was to put the other shops "in a hole," as shown in Thomasson's letter respecting the Atlanta contract. (Rec., pp. 86, 87.) He frankly says in this letter:

> We believe that as a general thing we have had our prices entirely too high, and especially do we believe this has been the case as to prices in reserved cities. *The prices made at St. Louis and Atlanta are entirely out of all reason*, and the result has been and

> always will be, when high prices are named, to create a bad feeling and an agitation against the combination. There is no reason why Atlanta, New Orleans, St. Louis, or Omaha should be made to pay higher prices for their pipe than other places near them who do not use anything like the amount of pipe and whose trade is not as desirable for many other reasons.

In this connection, note the provision in the reserved city plan (Rec., p. 66) with respect to St. Louis, Mo., reserved for the Bessemer Company. After thus reserving St. Louis, this provision was made:

> Extra bonus to be put on East St. Louis and Madison, Ill., so as to protect the prices named for St. Louis, Mo.

The reserved-city plan was all right as a means of advancing prices. The fixed-bonus plan, however, was dropped, being succeeded by the auction-pool plan. Under the auction-pool plan there could be no competition among the members of the association. Every inquiry for pipe except in the reserved cities was referred to the representative board, which fixed the price to be paid. Here was a perfect plan for advancing the price to whatever figure the combination thought the contract would stand. The representatives of the different shops then bid against one another for the job, the combination getting the benefit of the bonus. This was a vast improvement on the fixed-bonus plan. Its adoption resulted in December, 1895 (Rec., p. 72), in the modification of the reserved-city plan, so as to give the combination authority, through its board, to fix the price and bonus for each reserved city.

The fixing of the price and the determination of the bonus at a meeting of the representative board had the natural result of advancing the price of pipe and increasing the amount of the bonus paid to secure the work. Mr. Thomasson, in his letter of January 2, 1896, says (Rec., p. 94): "The average bonuses that are prevailing to-day are $7 to $8." The natural result of an arbitrary fixing of the price was an increase of the profit in the transaction, and hence a bigger bonus was bid. The advance in the price of pipe under the arbitrary method of the association explains the raising of the bonus. The members bid among themselves for the job, not to get the work, but for the money there was in it. Thomasson, in his letter of January 2, 1896 (Rec., p. 93), gives the figures at which it was profitable for him to make and sell pipe at the shop. Work which would net him less than the amounts he names, from $13 to $14.75, at the shop, he did not care to have. If the bonus bid cut the price down below that figure, he prefers his share of the bonus; let the others take the work.

In the case of *Anderson* v. *U. S.* (171 U. S., 604), involving the validity of the Traders' Live Stock Exchange, of Kansas City, Mr. Justice Peckham, speaking for the court, said, page 615:

> It has already been stated in the Hopkins Case, above mentioned, that in order to come within the provisions of the statute the *direct effect* of an agreement or combination must be in restraint of that trade or commerce which is among the several States, or with foreign nations. Where the subject-matter of the agreement does not *directly* relate to and act upon and embrace interstate commerce, and

where the undisputed facts clearly show that the purpose of the agreement was *not to regulate, obstruct, or restrain that commerce,* but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, *and not its purpose or object.*

After showing the character of the agreement creating the live-stock exchange, and its purpose and effect, the court continues, page 617:

The agreement now under discussion differs radically from those of *United States* v. *Jellico Mountain Coal and Coke Co.*, 46 Fed. Rep., 432; *United States* v. *Coal Dealers' Association of California*, 85 Fed. Rep., 252, and *United States* v. *Addyston Pipe and Steel Co.*, 85 Fed. Rep., 271. The agreement in all of these cases provided *for fixing the prices* of the articles dealt in by the different companies, being in one case iron pipe for gas, water, sewer, and other purposes, and coal in the other two cases. If it were conceded that these cases were well decided, they differ so materially and radically in their nature and purpose from the case under consideration that they form no basis for its decision. This association *does not meddle with prices* and itself does no business. In refusing to recognize any yard trader who is not a member of the exchange, we see no purpose of thereby affecting or in any manner restraining interstate commerce, which, if affected

> at all, can only be in a very indirect and remote manner. The rule has no direct tendency to *diminish or in any may impede or restrain interstate commerce* in the cattle dealt in by defendants. There is no tendency as a result of the rule, directly or indirectly, *to restrict the competition* among defendants for the class of cattle dealt in by them.

The court thus clearly and conclusively distinguishes the Hopkins and Anderson cases from the one under consideration. There was no meddling with prices in either of those cases, no restriction placed upon competition. In the case before the court the restraint is directly upon competition in interstate commerce, and was put there in order to advance and maintain prices.

Speaking further with regard to the agreement creating the exchange, the court says, page 618:

> The agreement relates to the action of the associates themselves, and it places in effect no tax upon any instrument or subject of commerce; it exacts no license from parties engaged in the commercial pursuits, and prescribes no condition in accordance with which commerce in particular articles or between particular places is required to be conducted. (Citing cases.)

But the agreement before the court does all of these things. It places in effect a tax upon a subject of commerce, by requiring the payment of a bonus in the case of interstate sales and shipments; it exacts a license from parties engaged in commercial pursuits, requiring them to pay a premium to a common fund for the privilege of selling their goods among the several States in the pay territory; it prescribes conditions in accordance with

which commerce in cast-iron pipe between particular parties and particular places is required to be conducted. The combination was formed for the purpose of regulating and restricting contracts to sell and deliver pipe in the competitive territory. The competitive territory was selected and set apart. Purchasers in that territory, called the "pay territory," were discriminated against. The members of the association were left free to sell at whatever price they saw fit, and under no restrictions or limitations, in the free territory; but this was not true as to the pay territory.

I submit that a combination among great manufacturing corporations, located in different States, which divides up the territory of the United States, leaving a portion of it open to the law of competition, and suppresses competition in all the rest, permitting prices to be fixed by natural laws in certain States, and arbitrarily fixing the prices itself in other States, is condemned by the anti-trust law and ought to be declared illegal by this court.

JOHN K. RICHARDS,
Solicitor-General.

APRIL 26, 1899.

APPENDIX.

RACTS FROM MR. WHITNEY'S BRIEF FOR THE GOVERNMENT IN THE CIRCUIT COURT OF APPEALS.

2. *Purposes of the agreement.*

The agreement of May 27, 1895, contains the following recital of its purpose (Rec., p. 70):

Whereas, the system now in operation in this association of having a "fixed bonus on the several States" not in its operation resulted in the *advancement in prices of pipe* as was anticipated, *except in "reserved* ts," and some further action is imperatively necessary order to accomplish *the ends for which the association formed:* Therefore [etc.]."

Mr. Bowron, of the South Pittsburg company, says t the association was established "to maintain fair ces and a just distribution of work"—"to maintain prices and secure for each a fair proportion of the rk in a certain territory, by restraining in a certain asure competition as among themselves only"—"to train competition as among defendants, and allow to h a profitable division of work according to its relae capacity, and thereby maintain fair prices to all" . 160–161).

Mr. C. W. Harrison, of the same company, says that it s "on the theory that destructive competition results monopoly," and that it "was the purpose of this association to maintain fair prices and secure for each of its

members a fair proportion of the work in a certain territory by restraining in a reasonable measure competition as among themselves only" (pp. 178–9).

Mr. Callahan, of the Louisville company, says that it was "to maintain fair prices, to regulate credits, and to accomplish an equitable distribution of such orders as the six defendants could secure in competition with the other manufacturers of cast-iron pipe"—"by regulating to a certain extent the competition among the defendants only, to endeavor to maintain fair prices, and to secure to each of the defendants a fair proportion of the orders in a certain territory" (pp. 217–8).

In describing the auction system Mr. Callahan clearly states what "fair prices" mean as understood by such combinations: "These voluntary offers from defendants were each based upon such prices for the respective orders as these defendants considered would be fair and reasonable prices" (p. 218).

That fairness and reasonableness from the consumers' point of view was not at all taken into consideration is shown by the prices actually charged in "pay territory" as set forth in the record, and by a letter of Mr. Thomasson of the Chattanooga company (pp. 86–87):

We believe that, as a general thing, we have had our prices entirely too high, and especially do we believe this has been the case as to prices in "reserved cities." The prices made at St. Louis and Atlanta are entirely out of all reason, and the result has been and always will be, when high prices are named, to create a bad feeling and an agitation against the "combination." There is no reason why Atlanta, New Orleans, St. Louis, or Omaha should be made to pay higher prices for their pipe than any other places near them who do not use anything like the amount of pipe and whose trade is not as desirable for many other reasons.

The affidavits of defendants show how in some respects this combination works beneficially by distributing orders

in such a manner that a greater regularity of employment is obtained at the different shops. This is immaterial. Probably few unlawful combinations would fail to secure economy of service to some considerable extent. The element of evil does not fail to vitiate the agreement because it contains likewise an element of good. A most interesting letter of Mr. Thomasson (pp. 93–94) shows that the bonus system was not intended to work, and did not actually work, simply as a distributer of employment, leaving the price charged to the consumer merely the actual cost with a fair business profit. While some proportion of the bonus may represent economy in production, a part of it is shown to represent an extra profit divided up among the different companies. Mr. Thomasson points out how the Bessemer company is going too far in speculating on this extra profit, and how his own company is secretly taking advantage of this error of its associate (p. 94):

If they should continue to buy all the pipe that goes up to such figures as they have paid for Jacksonville and other points, they would wreck their shop in a few months. However, they of course calculate this bonus *will be returned to them on work taken by other shops.* We are very much pleased with the bonus that has been paid, and we only hope they will keep it up as it is only money in our pockets. * * * We note Mr. Thornton's report of average premiums from June 1 to December that the average was $3.63. The average bonuses that are prevailing to-day are $7 to $8. We can not expect this to continue. * * * If we can not secure business in "pay territory" at paying prices, we think we will be able to dispose of our output in "free territory," and of course make some profit on that. At the prices that Howard Harrison people paid for Jacksonville, Des Plaines, and one or two other points, they are losing from $2.50 to $3 per ton; that is, provided "bonuses" would not be

returned to them. Therefore when business goes at a loss we are willing that the other shops make it. * * *

P. S.—Do not leave this letter on your desk where it might fall into the hands of others. Make a memorandum and tear the letter up. Above all things make a confidant of no one in business matters.

3. *Practical construction and operation.*

The record gives some interesting information about the working of this agreement in different cities.

Chicago.—At a meeting of the associates on February 14, 1896, it was decided that an order of the Chicago Gas Company should be filled at $22 and $21.50 with a bonus of $5 (p. 75), and (apparently on some other Chicago advertisement, pp. 75, 76):

"On motion of A. F. Callahan, it was agreed on the dates of the Chicago letting at least five of the shops should be represented and a majority of them should decide what bid should be made. The job to be regularly disposed of by the committee before the letting."

The presence of five shops at the letting was in pursuance of the system of "protecting bids," by slightly higher false bids on the part of the companies which had agreed with the combination not genuinely to compete for the order. This system has been consistently maintained by the associates. Its advantages for purposes of concealment are obvious.

Louisville.—The record of December 20, 1895, contains the following (p. 73):

"F. B. Nichols moved that Dennis Long & Company be *allowed* to close contract for the year of 1896 with the Louisville Water Company at the best price they can obtain for same, and after securing contract refer the same to the meeting of the principals to fix bonus.

"Seconded by A. F. Callahan. Carried."

St. Louis.—Mr. Nichols, of the Bessemer Company, writes to the other companies, on January 24, 1896, as follows (p. 80):

"I prefer that if any of you find it necessary to put in a bid without going to St. Louis, please bid not less than $27 for the pipe and 2¾ cents per pound for the specials. I would also like to know as to which of you would find it convenient to have a representative at the letting. It will be necessary to have two outside bidders."

St. Louis was a "reserved city" belonging to the Bessemer Company (p. 66), and paying a bonus of $2 per ton (p. 66). The amount shipped from April 1 to December 31, 1895, was 10,970 tons, giving a bonus of about $22,000 to the combination (pp. 80, 81).

Knoxville.—The Knoxville Woolen Mills on April 25, 1896, wrote to Chattanooga and Bessemer for quotations of cast-iron pipe (p. 52). This contract seems to have been bid in by Chattanooga, which telegraphed the other companies on April 29: "We will advance price Knoxville Woolen Mills dollar and half; please protect" (p. 82), at the same time bidding $22 per ton (p. 53). Bessemer accordingly, through Mr. Nichols, bid $22.24 per ton on April 30, with the hypocritical comment, "Trusting that we will be favored with your order, we are, yours truly" (p. 54).

Omaha.—The working of the agreement is well shown by the bidding for Omaha on December 20, 1895 (p. 74):

"W. L. Davis moved to sell the 519 pieces of 20" pipe for Omaha, Neb., for $23.40 delivered.

"Seconded by D. R. P. Dimmick. Carried.

"F. B. Nichols moved that Anniston participate in this bonus and the job be sold over the table.

"Seconded by W. L. Davis. Carried.

"Pursuant to the motion the 519 pieces of 20" pipe for Omaha was sold to Bessemer at a premium of $8."

The water companies of Omaha belong to South Pittsburg (p. 66). The receiver of one of them called for

bids in April, 1896, under competitive circumstances which the company's agent evidently thought "will make him some trouble, especially if we try to obtain too high a price" (p. 101). In response to a call upon Chattanooga for "protection" Mr. Thomasson wrote as follows on April 28 (p. 102):

"Please advise us at once as to what figure we shall make on this work. Please do not ask us to make a price of two or three dollars per ton higher than yours, but give us a reasonable price to name."

The Pittsburg company responded (p. 102):

"We request that you please quote the American Water Works Company of Omaha price of $24.80 per ton of 2,000 pounds F. O. B. Omaha."

Accordingly Chattanooga wrote the following candid letter to the Receiver at Omaha (p. 103):

"DEAR SIR: Replying to your favor of the 25th instant, we propose to furnish cast-iron pipe as per specifications for $24.80 per ton two thousand pounds, and will furnish special castings from our regular patterns for two and one-fourth cents per pound, all delivered on board cars Omaha, Nebr. We are in a position to give you prompt shipment on this pipe *and trust this time we will be favored with your order.*

"Very truly, yours,

"CHATTA. FDY. & PIPE WORKS,

"By E. B. THOMASSON."

4. *The effects upon the public.*

It is not essential to show deleterious effects upon the public, but the subject is an interesting one, and the gleams of light from this record are also interesting.

The defendants have repeated *ad nauseam* affidavits tending to show that there were other large works—larger perhaps than their own—in the United States. A tonnage statement, for instance, is given (by an interested

witness and annexed to an evasive affidavit) of factories through the country, including some very large ones in Pennsylvania and New Jersey (p. 223).

It also appears, however, that the rates of freight are very high. For instance, pipe which is worth from $13 to $14.75 at the shop in Chattanooga (p. 94) pays $6 to Peabody, Mass., and $5.55 to Lockhaven, Pa. (p. 88); $5.60 to Clifton, N. Y. (p. 89), $4.80 to Wytheville, Va., $5.40 to Troy, N. Y., $3.90 to Allegheny, Pa., and $4.95 to Syracuse, N. Y. (pp. 89, 90). The effect of these high rates, together with the location of these factories on or near the west slope of the Appalachian Mountain range, gives to them (and to the few other western works) a practical monopoly of nearly all the "pay territory"—in other words, of everything but the Northern and the Middle States. To this general statement there must be, of course, an exception as to localities on the coast line and elsewhere within the "pay territory" that are within the reach of northeastern factories. The small importance of these exceptions, however, may be gathered from the affidavits submitted by defendants themselves. They have undertaken to show the actual origin of the pipe used in large portions of the "pay territory," and have only succeeded in identifying the great Pennsylvania and New Jersey factories with two small lots of unspecified amount (pp. 176, 224). They content themselves with such evasive statements as those of Mr. Callahan, at pages 216–219 of the record, specifying neither the size of the orders nor the portions of the "pay territory" where they are found.

It is clear that as to the bulk of the "pay territory"—that is, as to the bulk of the United States—their competition comes from but few rivals. In main it seems to be confined to the works at Cleveland, Columbus, and Newcomerstown, Ohio, and Detroit, Mich., whose capacity is 200, 100, 75, and 75 tons per day, respectively

(pp. 149, 150, 156, 163, 206). A concern is indeed mentioned as competing at St. Louis, but it is suspected to be identical with the Bessemer concern (p. 52), with which it is almost identical in name. The factories in Colorado and Oregon are small and seem to cut only a local figure. The same may be said of the Texas penitentiary.

Such information as is given us leads to the conclusion that the Ohio and Michigan concerns have the smaller end of the business, even in territory for which transportation rates permit them to compete. Mr. Hallett, a general contractor in Aurora, Ill., gives the precise figures for his purchases in 1895 and 1896. He purchased 514 tons from the combination, 25 tons from the Newcomerstown concern (J. B. Clow & Son), and 50 tons from jobbers (pp. 103–104). Mr. W. H. Garrett, of Batavia, Ill., gives the purchases of the waterworks department of Fairbanks, Morse & Co. for the same period. They included 1,023 tons from the combination, 690 tons from Columbus, 79 tons from Cleveland, and 35 tons from the Glamorgan Pipe and Foundry Company, of Lynchburg, Va. These purchases were "in the business of contracting waterworks for municipalities *throughout the United States* (pp. 108–109).

We could judge more accurately of the strength of the Associated Pipe Works if we were definitely informed as to their capacity *per diem*. They have been so careful to produce testimony as to the *per diem* capacity of other companies (pp. 147–8, 149–50, 155–6, 163, 164–5, 205–6) that we may infer that there was good reason for their failing to be specific as to their own. The only specific testimony bearing on the point is that of Mr. Llewellyn as to his Chattanooga company. He gives its capacity at "about 40,000 tons of cast-iron pipe and special castings annually" (p. 201). This figure, however, is evidently taken from the minutes of the combination at page 73, which is shown by Mr. Thomasson of his own company not to represent the actual capacity of

the various works, but their usual output (p. 94). The 40,000 tons ascribed to Chattanooga represent its proportion of the 220,000, which are assumed, not as the full capacity of the works, but as their probable annual shipments into pay territory. The total of these shipments is estimated at 220,000 for the six companies, but Mr. Thomasson says:

"We think a very conservative estimate of shipments into this territory will amount to fully 200,000 tons this year; more than that—probably overrun 240,000 tons."

The same estimate which gives Chattanooga 40,000 tons gives South Pittsburg and Anniston 45,000 tons combined (p. 73); but the officers of these companies join with Mr. Llewellyn himself in verifying the answer (pp. 35, 36), which contains the following statement as to the "pay territory" (p. 30):

"They, however, deny that the shipments of pipe for 1896 amount to more than 100,000 tons in said territory, which they aver could have been supplied by any two of defendants so as to deprive all others of any share thereof."

In ascertaining the actual capacity we may therefore pretty safely double the estimate at page 73, and assume it to be 440,000 tons a year, or nearly 1,500 tons per day, as against the 450 tons per day of their four principal rivals.

As confirmatory of the position that no reliance is to be placed upon the statements of these defendants as to the relative working capacity of the different shops (except when their statements are not made for use in the present suit), we may compare the answer which they all join in verifying with the testimony of their own witnesses concerning the capacity of other works. Thus, the answer states the capacity of Scottdale as 200 tons instead of 100; of Columbus as 150 tons instead of 100; and of Detroit as 100 tons instead of 75 (pp. 36-37, 148, 156, 206).

Another example of the misleading character of this testimony is in the statement of Mr. Callahan at page 219 as to the actual clearance settlements amounting in 1895 to only 38 cents per ton, when compared with Mr. Thomasson's letter of January 2, 1896, showing that the average premiums from June 1 to December 31, 1895, were $3.63 (p. 94).

Besides the partial monopoly which they were enabled to maintain through the high transportation rates and the limited output of their Western rivals, they doubtless resorted to special means for diverting rivalry, such as the negotiation for the withdrawal of the Philadelphia company from competition at Atlanta (p. 87), and the plan to prevent one Drummond "from invading our western territory" (p. 95).

Reasonableness of prices.—It will be borne in mind that, even under the common-law doctrine permitting reasonable restraints of trade, the burden of proof as to reasonableness is on the defendant.

We have in this record, however, affirmative evidence of the unreasonableness of the profits obtained by these corporations. Their unreasonableness is shown in various ways, such as by adding the price at the factory (p. 93) to the transportation rate (p. 76), and comparing this with the prices actually obtained, which usually range from about $22 to $25 per ton. It is also shown by the actual bonuses paid to the combination for the privilege of getting a contract, these bonuses running up to such figures as $7.10 (p. 76), $7.50 (p. 75), and $8 (p. 74)—averaging from $7 to $8 in January, 1896 (p. 94). It is also shown by the large amounts of the aggregate bonuses which were divided up among these companies (pp. 98, 99). It is confirmed by the statement of the Chattanooga company itself that the prices were "entirely too high," especially in the "reserved cities;" that "the prices made at St. Louis and

Atlanta are entirely out of all reason, and that "there is no reason why Atlanta, New Orleans, St. Louis, or Omaha should be made to pay a higher price for their pipe than other places near them" (p. 87). No objection was made to this statement on the score of competency, nor can its competency be doubted. (*Wiborg* v. *United States*, 163 U. S., at pp. 657–658.)

By unduly and vastly raising the normal price of cast-iron pipe among communities which, by their geographical position, should have enjoyed special advantages, the combination has the indirect result of increasing competition in the northeastern or "free territory." This is shown by Thomasson's letter (pp. 93, 94), stating the policy of the Chattanooga company in view of the high bonuses paid by the Bessemer company for Southern contracts. He figures out an advantage to the Chattanooga company in refraining from bids and taking its share of the bonus without contributing to the fund, and adds:

"If we can not secure business in 'pay territory' at paying prices we think we will be able to dispose of our output in 'free territory,' and of course make some profit on that."

Thirteen dollars to $14.75 per ton is stated in the same letter to be a profitable figure, and the Chattanooga company's propositions to northeastern cities after this letter (pp. 88–90) show how the theory is carried into practice by giving those cities an advantage of several dollars per ton in price over the naturally better situated cities immediately adjacent to the works of these defendants. Mr. Llewellyn, of Chattanooga, the chairman of the combination and one of its principal witnesses, was thus secretly inimical to its interests.

The letter announcing this scheme is dated January 2, 1896. We are furnished with the balance sheet showing payments and divisions of bonus for the ensuing four and

one-half months (pp. 98, 99). We find that Chattanooga during those months paid in $2,016.25, and drew out $15,077.99—truly a vindication of the wisdom, if not of the candidness, of this valuable witness.

Cast-iron pipe, if we may believe Mr. Harrison of South Pittsburg, "has no market value" (p. 177). "On account of the manner in which these contracts are let, the customer prevented the establishment of any market price" (pp. 178–179). We are, therefore, without any standard of reasonableness derivable from market quotations. The evidence, however, is overwhelming that in large portions of the country the price is half as much again what it ought to be.

There is, indeed, a large collection of affidavits stating that these prices are reasonable in the opinion of the affiants. Some of the affidavits are by interested parties, more or less discredited, as above shown. Most of the rest are by persons who have no real expert knowledge. It will be remembered that cast-iron pipe, on account of the peculiarities of its use, and on account of the high transportation rates, has no general market price throughout the country. Each local witness knows only that the combination gives him as low prices as anyone else, knowing nothing of the conditions governing the price as it would be if the combination should dissolve.

Moreover, the opinions are not accompanied by facts to back them, further than the single fact that the combination is able to underbid its competitors in certain localities. Such unsupported opinions have no weight under the rules governing expert evidence, as set forth in *The Conqueror*, 166 U. S., 110, 130–4, and cas. cit.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE ADDYSTON PIPE AND STEEL COMPANY, Dennis Long & Co., Howard-Harrison Iron Company, Anniston Pipe and Foundry Company, South Pittsburg Pipe Works, and Chattanooga Foundry and Pipe Works, appellants,
v.
THE UNITED STATES.
} No. 269.

POINTS FOR THE UNITED STATES IN REPLY.

I.

It is urged that under the "auction pool" plan there was competition, because at the public letting there would be other bidders, whose prices would have to be met. It is not the contention of the Government that the combination absolutely prevented competition from outside shops. The competition it stifled was competition among its members. The "auction pool" plan absolutely prevented any competition among the parties

to the agreement. The central board, composed of representatives of the six shops, fixed in advance the price to be charged. We can readily understand that in fixing the price the board took into account possible competition from outside sources. The price was fixed to meet such competition if any was anticipated. The job was then sold over the table. The shop which bid the highest bonus for the benefit of the pool got the job. The successful shop took the job at the price fixed by the board. It expected to bid the fixed price and the other shops were required to overbid the fixed price in order to deceive the public.

II.

But it is urged that the successful shop might have to bid under the fixed price in order to meet outside competition and secure the job. Concede this to be true in an exceptional case, where competition not anticipated by the board in fixing the price, had to be met. How does this affect the "auction pool" plan and relieve it of any obnoxious feature? The public would get the benefit of outside competition despite the combination, whose expectation and intention was to carry through the arbitrary price fixed in advance of the public letting. The bonus was based on the fixed price. The successful bidder agreed to pay the bonus upon the understanding that the job was to be secured at the fixed price. If unexpected competition from outside sources required a reduction in the fixed price to secure the job, then the bidder was entitled to a reduction of the bonus. An illustration of what took place when a reduction was required to secure

a job is to be found in the record, bottom page 76. In the minutes of the meeting of the combination at Chicago March 13, 1896, is the following:

> The following motion was offered by W. L. Davis: "It having been demonstrated that sales memos. Nos. 107 and 118 are the same enquiry, the committee's action on 118 is hereby cancelled and the bonus on 107 reduced to $6.55 to equalize the reduction of one dollar per ton made by Bessemer to meet the price made by Shickle, Harrison & Howard Iron Co." Carried.

Evidently in this instance the bonus was treated as surplus profits. The required reduction of price to meet outside competition was followed by a similar reduction of the bonus or extra profits to be divided among the combination.

III.

For the convenience of the court, I print here the table comparing prices fixed by the combination in the pay territory with prices fixed by competition in the free territory in the spring of 1896. This table, taken in connection with Mr. Thomasson's letter of January 2, 1896 (Rec., p. 93), shows conclusively that the combination was not formed for the purpose of fixing reasonable prices, and did not fix reasonable prices, but that the stifling of competition resulted in an unreasonable advance in prices. The object of the combination was to advance prices by suppressing competition. This object was attained under the "auction pool" plan, as the record clearly shows.

PAY TERRITORY.

Atlanta, $24. Bonus, $7.10. (Page 76), February 17, 1896.

Meeting, February 14, 1896 (Rec., p. 75).

	Price fixed.	Bonus.	Net at place.
Chicago	$22.00	$5.00	$17.00
Evanston	23.80	5.00	18.80
Calumet	23.50	5.00	18.50
Louisville	22.50	6.50	16.00
St. Louis (Laclede)	24.00	5.65	18.35
St. Louis (W. W.)	24.00	6.50	17.50
C. R. I. & P. R. R., year's supply	22.35	7.50	14.85

FREE TERRITORY (Rec., pp. 88, 89, 90).

March 27 to April 29, 1896.

	Prices bid.	Rate freight.	Net at shop.	At Atlanta or St. Louis.
Peabody, Mass	$19.75	$6.00	$13.75	$16.75
Lockhaven, Pa	19.00	5.55	13.45	16.45
Clifton Springs, N. Y	18.07	5.50	12.57	15.57
Wytheville, Va	18.30	4.80	13.50	16.50
Troy, N. Y	19.40	5.40	14.00	17.00
Pittsburg, Pa	17.25	3.90	13.25	16.25
Syracuse, N. Y	18.45	4.95	13.50	16.50
Malden, Mass	19.80	6.00	14.40	17.40

IV.

It was contended in the argument that there is no regular market price for cast-iron pipe, and for this reason it was proper for these companies to suppress ruinous competition among themselves in bidding for public contracts. I do not concede there is no regular market price for cast-iron pipe. Cast-iron pipe required for sewer, gas, and water purposes is of certain fixed dimensions; it has a cost of production which varies according to the cost of the material and labor, as in the case of

other manufactured articles, and it has a price in the market, as the record shows. But if it were true that cast-iron pipe has no market price, this would be but another reason for insisting upon open competition among the shops which produce it. If there be no competition, how is it possible to determine what is and what is not a reasonable price? There is no market price, according to the other side, to gauge the arbitrary prices fixed by the combination.

V.

Mr. Spurlock, in his argument, insisted that the words "a bonus" do not aptly describe the sum paid by the shop which got a contract in the pay territory into the pool for division among the members of the combination. He said it would be better to call this sum "a handicap." I am disposed to agree with him. Looked at from the point of view of the Government, the so-called bonus was a handicap. The public got no benefit from the bonus. The bonus was a handicap to the public. A handicap is a burden put on the competitor possessing superior advantages, in order to equalize the chances of all who enter into the competition. In other words, in order to prevent the public from getting the benefit of the superior advantages which the shop best situated to do the work possessed, the combination, under the fixed bonus plan, put a bonus or handicap on such competition. The shop which got the job had to pay so much a ton to the pool on the contract. The handicap thus placed on competition benefited the pool at the expense of the public.

I took occasion to explain to the court in my argument that the fixed bonus plan was not successful because it permitted competition among the various shops subject to the payment of the fixed bonus to the pool. Such competition prevented that advancement of prices which the combination was intended to secure.

Under the "auction-pool" plan, the amount of bonus did not in itself affect the public. The arbitrary determination of the price in advance was what affected the public. The amount of the bonus, afterwards determined by the sale of the job over the table, indicated the amount of profit there was in the job, the extent to which it was proposed to fleece the public, and the amount of extra profit there was which the successful bidder was willing to divide with the other members of the combination. This, however, was secondary. Under the "auction-pool" plan the injury to the public was occasioned primarily by fixing the price without competition. The subsequent proceedings were among the members of the combination and for the purpose of dividing the spoils.

VI.

In the trans-Missouri and joint traffic cases it was argued that the railroad companies ought to be permitted to enter into agreements for the purpose of preventing ruinous competition because railroads are public agencies and are compelled to run their roads and accept passengers and freight for transportation. The court overruled that contention. Now it is insisted that so-called private

corporations ought to be permitted to enter into a combination to suppress competition in interstate business for the purpose of arbitrarily fixing prices, because they are not public agencies and can not be compelled to keep their shops running or sell their goods to any person who applies. The decisions in the trans-Missouri and joint traffic cases were not placed on the ground that the anti-trust law applies peculiarly to railway companies because they are public agencies. The strenuous fight made in the first case was that the anti-trust law was never intended to apply to railroads; that the trusts and combinations which Congress had in mind were trusts and combinations among individuals and private corporations, in other words, manufacturing and commercial trusts, and not transportation trusts. The court held that the antitrust law applies to railroads because the broad language of section 1 reaches "every contract, combination in the form of a trust, or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations." It matters not who are parties to the contract or combination; it matters not the degree of restraint; it is only necessary that the combination shall put a restraint upon trade or commerce among the several States or with foreign nations.

VII.

It is said, however, that this conspiracy is safe behind the shield of liberty of contract. Having the right to contract, individuals and corporations may make what contracts they please, whatever be the restraints thereby imposed upon trade or commerce among the several

States. The liberty contended for is the liberty to destroy liberty. The liberty which the commerce clause of the Constitution was intended to secure and preserve is the liberty of every individual to make what contract he sees fit for the sale of his goods among the several States; to do this without any burden or restraint. He is to be free to trade among the several States upon what terms he sees fit. Mr. Warrington contends, however, that this liberty, secured by the commerce clause of the Constitution, is subject to a higher liberty, the liberty of certain individuals to combine and destroy the liberty of each to trade among the several States upon such terms as each thinks proper. This suggests the sacred right of self-government, contended for by Senator Douglas and described by Mr. Lincoln:

> This sacred right of self-government amounts to this, that when two men agree to enslave another no third man shall interfere.

So with Mr. Warrington's sacred liberty of contract. It means that when six shops agree with one another to destroy their individual freedom of contract and of competition, and to put themselves in slavery to the pool, the Government can not interfere. Now, I submit that it never has been held, under the English common law, that liberty of contract includes the right to persons and corporations to combine and agree to destroy competition and arbitrarily fix prices. Agreements of that kind are against public policy. Mr. Warrington feels aggrieved because I have insisted too much upon "the personal equation" in this case. Well, the personal equation is what the Government is after. I do not believe in

arguing abstract questions. The question here is whether the agreement among these shops is one in restraint of trade. Mr. Warrington virtually concedes it is, and yet he says that its members have the right, because of their liberty of contract, to enter into such an agreement. The result, if not the purpose, of his contention is to confuse. Clearly the agreement under consideration was one in restraint of trade & commerce, one against public policy, and one which no liberty of contract would serve to uphold.

VIII.

Section 8, Article I, of the Constitution defines the positive powers conferred upon Congress. The third of these powers is:

> The Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes.

Mr. Warrington insists that this power was conferred upon Congress "to insure uniformity of regulation against conflicting and discriminating State legislation," and that therefore the only acts restraining trade or commerce among the several States which Congress may regulate and prevent are public and quasi public acts. In other words, Mr. Warrington says that Congress was given power to legislate on this subject in order to prevent the States from legislating, and, therefore, Congress has no power to legislate—it can only prevent the States from legislating. I concede that Congress was given the power to legislate upon the subject in order to insure uniformity of legislation and to do away with the

conflicting and discriminating State legislation. The power given to Congress was not, however, merely prohibitive. The makers of the Constitution did not intend to prohibit the States from regulating such commerce and then leave no power in Congress to regulate it. The power given Congress was not prohibitive, but positive. The mere fact that the Constitution has given Congress the power to regulate this commerce has led the Federal courts to hold attempts on the part of the States to regulate it null and void. It is not necessary for Congress to legislate in order to prevent restraints by States or municipalities. The courts are able to take care of such obstructions. The antitrust law was passed, however, under the positive power conferred on Congress to regulate commerce among the several States. To argue that Congress can not, under this positive power, prevent restraints or obstructions to trade or commerce among the several States by corporations and individuals is as much as to say that, under the same power, Congress may prevent States and municipalities from placing obstructions in navigable rivers of the United States, but has no power to prohibit or remove obstructions placed there by private persons or corporations. It is the duty of the General Government to keep such highways of commerce free from *all* obstructions, regardless of the source. So with respect to interstate trade, intrusted by the Constitution to the care of Congress. A restraint put upon trade among the several States by a combination of corporations injures the public as much as a restraint put there by States or municipalities. Such restraints appeal peculiarly to Congress. Interferences from States and

municipalities may be handled by the courts, such public acts being held void, but Congress, under the positive power given it to regulate commerce, must take care of interferences by corporations and individuals. To concede that a restraint put on interstate trade or commerce by a State is void, and to insist that Congress is helpless before a restraint placed on such trade by a combination of corporations, is to hold that the corporations are greater than the States. If the General Government has authority to prevent restraints by States it does not lack power to prevent such restraints by the creatures of the States.

> If a State, with its recognized powers of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess? (*In re Debs*, 158 U. S., 564, 581.)

IX.

Mr. Warrington seems to concede at one place in his reply brief that his liberty of contract argument would not apply to an agreement invalid in law. Yet such is the character of the agreement which he is trying to uphold. The agreement which formed the combination or conspiracy in this case is an agreement against public policy, invalid at common law, and expressly prohibited by the antitrust law. There can be no right or privilege under the Constitution to make an agreement of this character. After all, the legal question is whether the agreement did actually put a restraint upon trade or

commerce among the several States. In my brief and in my argument I think I sufficiently discussed that point. Mr. Warrington still insists that my contention was and is that the obnoxious agreement is in itself an act of interstate commerce. I never said so. I say that the agreement between the six shops puts a restraint on interstate commerce. It puts a restraint on interstate commerce in the same way that the agreements among the railroads in the trans-Missouri and joint traffic cases did. The railroad agreements provided a method of fixing the rates and fares in contracts for transportation among the States. This agreement provides a method for fixing the prices on contracts for sales among the States. Contracts to sell goods among the several States are as much interstate commerce as contracts to carry goods among the several States.

JOHN K. RICHARDS,
Solicitor-General.